



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 26, 1996

Mr. Jeffrey J. Horner
Bracewell & Patterson
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR96-2250

Dear Mr. Horner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 37350.

The La Porte Independent School District (the "district"), which you represent, received several open records requests from a district employee for certain records pertaining to the employee's performance evaluation as a teacher. You state that the contents of the employee's personnel file have been released to her. You contend, however, that other records responsive to the requests are not subject to the provisions of the Open Records Act and, thus, need not be released to the requestor. Alternatively, you contend that the records are excepted from required public disclosure by sections 552.102 and 552.111 of the Government Code.

As a threshold issue, we first address whether the requested records constitute "public information" under the Open Records Act. Section 552.002 of the Government Code provides:

(a) In this chapter, 'public information' means information that is collected, assembled, or maintained under a law or ordinance *or in connection with the transaction of official business*:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it. (Emphasis added.)

You have submitted three categories of records to this office for our review: (1) 21 pages of typewritten "notes," dated from January 6, 1995 to November 17, 1995, some of which have attachments; (2) a three-page intra-office memorandum from "Debbie Phillips" concerning dates "8-17-95" through "Oct. 3, 1995"; and (3) handwritten notes of the requestor's performance while teaching a class on November 13, 1995.¹ You have also submitted to this office an affidavit executed by principal of the school in which the requestor teaches and who asserts in her affidavit that the records at issue are her own "private property":

The information requested from me is private property contained on my personal computer at home and reflects confidential information concerning [the requestor's] students shared by their parents. The [handwritten] appraisal notes requested are my personal script from the formative observation of [the requestor] on November 13, 1995. The script contains subjective information that includes my opinions concerning her performance as a classroom teacher during the observation period.

Section 552.002 of the Government Code exempts materials from the provisions of the Open Records Act in situations where materials are produced by or for a governmental body but the governmental body has neither an ownership interest in nor a right of access to the materials. Because the official actions of a public school employee are the "official business" of the district, we must conclude that when the school principal created her notes, she subsequently had access to them in her official capacity as the teacher's supervisor. See Attorney General Opinion JM-1143 (1990) (county clerk has access to privately owned tape recordings of commissioner's court meetings). Consequently, the district has a right of access to these records through the principal. The fact that the principal considers the information to be her "private property" has no bearing on whether the information is subject to the provisions of the Open Records Act. See *id.*

We also conclude that the fact that the records at issue are maintained by the principal in her home is irrelevant to whether the documents are subject to the Open Records Act. Open Records Decision No. 425 (1985). If a governmental body could withhold

¹The requestor also seeks the written notes of the principal's observation of her January 29, 1996 classroom instruction. Because you have not submitted to this office for review these particular records, we will deem the handwritten notes from November 13, 1995, as "representative" of these other requested records. See Open Records Decision No. 499 (1988), 497 (1988).

information, which clearly relates to "official business" on the ground that the information is maintained by the individual members of that body rather than in the body's administrative offices, it could easily and with impunity circumvent disclosure requirements. The legislature could not possibly have intended to allow governmental entities to escape from the act's disclosure requirements in this manner.

It is clear from a review of the records at issue that they were created and are being maintained by a public employee in connection with her official duties. Consequently, these records cannot be deemed to be outside the scope of the Open Records Act. *See generally* Open Records Decision No. 450 (1986) at 3-4. *See also* Open Records Decision No. 327 (1982) ("any information relating to an employee's employment and its terms, constitutes information relevant to the individual's employment relationship and is a part of his personnel file"). Accordingly, the records at issue are subject to the Open Records Act and must be released to the requestor unless one or more of the act's exceptions to public disclosure applies.

We must next address another issue that has arisen in connection with your request for an open records decision: whether the request was made in a timely manner. Section 552.301(a) provides:

A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time *but not later than the 10th calendar day after the date of receiving the written request.* [Emphasis added.]

Further, section 552.302 of the Government Code provides:

If a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information.

The requestor contends that she initially requested the records at issue on October 24, 1995 and November 3, 1995, but that these requests were denied because she did not address the requests to the appropriate district employee and because she did not use the correct "district form." The requestor goes on to contend that the district sought an opinion from this office only after she submitted a third request for the information on November 17,

1995. You do not contest these allegations, but merely respond by stating that the requestor "did not make a request for information *pursuant to District guidelines on the District's approved forms* until November 17, 1995."

It is well established that, although a request for information under the Open Records Act must be in writing before section 552.302 applies, *see* Open Records Decision No. 304 (1982), no particular request form or "magic words" are required by section 552.301. Open Records Decision No. 483 (1987). Consequently, the fact that the requestor's first two open records requests were not contained in an "approved" district form does not prevent them from triggering section 552.302. Because you did not request an opinion from this office until November 22, 1995, we conclude that your request was not in compliance with section 552.301(a), and that the information at issue is presumed to be public pursuant to section 552.302 of the Government Code. Accordingly, the district must release these records unless there exists a compelling reason for withholding them. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ).

You have not presented this office with a compelling reason for withholding the requested information pursuant to section 552.111. Accordingly, we conclude that the district has waived the protection of this exception.

Although you have also raised section 552.102 of the Government Code, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," it is not clear to this office which employee's privacy you seek to protect. The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). The information at issue contains no "private" information about the principal, and to the extent that any of the information concerns the privacy interests of the teacher/requestor, the requestor would have a special right of access to that information pursuant to section 552.023 of the Government Code. We therefore conclude that the district may not withhold any of the information at issue from the requestor pursuant to section 552.102.

This does not, however, end our discussion of whether the requested records must be released. The presumption arising with a violation of section 552.301 can be overcome where the information at issue is made confidential by other law, or where third party interests are at issue. Open Records Decision No. 150 (1977). Section 552.114(a) of the Government Code requires that the district withhold

information in a student record at an educational institution funded wholly or partly by state revenue.

Similarly, section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain numerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A).

For purposes of FERPA, the records at issue constitute "education records" to the extent that they contain information about identifiable students. However, information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). We have marked those portions of the some of the records made confidential under FERPA. The district must withhold those and similar portions of the records unless you receive permission to release the information from the parent of the student. All remaining portions of the requested records must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/RWP/rho

Ref.: ID# 37350

Enclosures: Marked documents

cc: Ms. Karen L. Johnson
General Counsel
Texas State Teachers Association
316 West Twelfth Street
Austin, Texas 78701
(w/o enclosures)